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ABSTRACT

Legal opinion and case law concerning door-to-door solicitation in student residence halls and other campus facilities are discussed in order to assist administrators in policy development and review. Conclusions include the following: colleges' regulation of solicitation is limited by First Amendment free speech guarantees; in deciding what areas of the campus are "public forums" and covered by the First Amendment, administrators should consider the purpose and character of the area and its patterns of activity; solicitation that constitutes a "clear and present danger" to individuals is not protected by the First Amendment; regulations that attempt to limit solicitation should be narrow in scope and as specific as possible; false or deceptive commercial solicitation can be regulated by colleges; solicitation may be regulated on campus according to the reasonable time, manner, and place concept; while solicitation can be prohibited in academic and administrative areas and common areas adjacent to classrooms, common areas such as student unions and walks are not protected by the First Amendment; and residence hall door-to-door solicitation can be regulated by the college. A list of court citations is appended. (SW)

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# TO SOLICIT OR NOT SOLICIT--THAT IS THE QUESTION:

# ISSUES AND GUIDELINES FOR THE COLLEGE ADMINISTRATOR

# CONCERNED WITH SOLICITATION ON THE COLLEGE CAMPUS

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HE 018 205

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ABSTRACT

Solicitation on the college campus, especially in residence halls, is an issue which generally receives little attention from administrators with responsibility for policy formulation. The result has been, in many cases, policy and procedures statements which are vague and/or overly broad, and which, in effect, violate the First and Fourteenth Amendment rights of students and of the public. This article synthesizes legal opinion and case law dealing with solicitation, and provides guidelines for the administrator interested in revising old policy or developing new policy and procedures. Solicitation, it seems, can be regulated by the institution, but only in a manner that is consistent with the rights of students.

INTRODUCTION

Even though, on its surface, the issue of solicitation on a public college or university campus appears to be a relatively simple legal matter (i.e., solicitation is either legal, or it isn't), a closer examination of the issue reveals a complex and legally muddled situation. Solicitation has many facets, including: commercial, non-commercial, advertising, sales, information dissemination of a commercial nature, political canvassing and pamphleteering, and religious canvassing and pamphleteering. In addition, the issue involves not only the campus as a whole, but its various subparts--academic and administrative areas, common areas, and residence halls--as well. Further complicating the picture is the number of legal points which can be involved in soliciting, including: First Amendment free speech rights, First Amendment religion rights, Fourteenth Amendment due process rights, Fourteenth Amendment equal protection rights, restrictions on the use of overly broad or vague statutes, the "clear and reasonable danger" concept, the "less restrictive means" doctrine, reasonable "time, manner, and place" restrictions, and the right to privacy.

Most of the cases involving solicitation on the campuses of pulic colleges or universities have involved First Amendment free speech issues, and most of the controversy that remains concerns solicitation in residence halls. For that reason, this article will concentrate on free speech issues involved in door-to-door solicitation in residence halls, but will cover other facets and areas as well.

To lend structure to the discussion, the article will be divided into sections as follows:

I. The Campus

II. Administrative, Academic and Common Areas

III. Door-to-Door Solicitation in Residence Halls

IV. Conclusions

## I. THE CAMPUS

"Colleges and universities are not enclaves immune from the sweep of the First Amendment" (Healy v James, at 2345).

In deciding whether or not soliciting should be allowed on college campuses, the general procedure followed by the courts has been to determine:

a) the extent to which a college is a public forum.

b) the requisites of a constitutionally permissible regulation governing state campus soliciting.

c) when a college may bar soliciting regardless of the existence of or compliance with a regulation.

The U.S. Supreme Court has consistently overruled statutes and regulations which banned the distribution of handbills on public streets without the prior consent of some public administrator.[1] In addition, blanket prohibitions on handbill distribution have been consistently invalidated by the courts as unconstitutional denials of free speech rights,[2] although in some cases, a state's interest has been held to "override its citizens' first amendment rights and a blanket prohibition has been upheld" (Prince v. Massachusetts). Applying this reasoning to a college campus could lead to the same conclusion reached by the 9th Circuit Court of Appeals in Jones v Board of Regents (at 623) that "a further analysis of case law indicates that broad free speech standards

governing such rights exist and that the exercise of university regulatory power in this area is constitutionally suspect." If the guidelines suggested in Wolin v. Port of New York Authority for determining whether or not an area is a "public forum" were followed (courts should consider: a. the character of the place, b. the patterns of actvity which usually occur in the area, c. the essential purpose of the area, and d. the number and classes of persons who use it), the applicability of the "public streets" concept to college campuses would be made clearer. In applying a test such as that suggested in Wolin to a campus, the court would consider the effect of the regulatory power of a state university over its campus. A college might designate certain areas of its campus, or even the entire campus, as off-limits to everyone except students or persons otherwise connected with the university, which would effectively deny those prohibited persons access to normal First Amendment rights. Morton Rosenfeld argues that "[i]n general, a state university is not so unique that special consideration should determine the issue of a public forum for handbilling" (p. 112). He reasons, however, that "distribution of literature . . . usually involves relatively few people who occupy only a limited area" (p. 113) and, "because it (handbilling) could be easily controlled," it would not interfere with normal campus activity and should not be banned. The courts have not always supported this point of view; as noted by the court in Evers v. Birdsong (at 905), "School campuses are not public in the sense of streets, courthouses, and public parks, open for expression of free speech by the public," and by the court in Wood v. Davison (at 544):

> a college or university has the right to adopt and enforce reasonable, non-discriminatory rules and regulations governing the utilization of its facilities, but the control exercised by the adminstrative officials must

conform to the Constitution and laws of the United States, and such conformity dictates equal application of reasonable and unambiguous regulations.

In the majority of cases, the courts have held that even though a college or university may regulate the conduct of students, faculty members, and those unaffiliated with the institution,[3] that right is not absolute,[4] but is subject to free speech protections guaranteed by the First Amendment. A number of useful guidelines for administrators to consider when developing a solicitation policy are included below.

1. The function of the University is to impart learning and to advance the boundaries of knowledge. That carries with it the administrative responsibility to control and regulate that conduct and behavior which tends to impede, obstruct or threaten the achievement of its educational goals (Goldberg, at 472).
2. If regulations impose only reasonable "time, manner, and place" restrictions on the right to solicit, they should be constitutionally permissible (Jones, at 625).
3. Sufficient interference with the activities of the college will justify a prohibition on soliciting (Norton, at 196; Tinker, at 514; Jones, at 627).
4. Nonstudents, or students who are permanently denied access to university facilities for soliciting must be afforded due process rights (Watson, at 1162).
5. The First Amendment right to hear, including the right to hear someone who is soliciting, is applicable to a college (Molpus, at 240), except where it is clear that the speaker will constitute a "clear and present danger" to the orderly operation of the university (Molpus at 241).

With rare exception, then, a college cannot constitutionally enforce a blanket prohibition on solicitation that covers the entire campus, unless the solicitation involves a "clear and present danger," a significant disruption to the orderly process of the institution, or illegal or fraudulent activities. Any attempt to regulate campus-wide solicitation must be narrow in scope, specific as to what is regulated, and allow solicitation according to some reasonable "time, manner, and place" standards. The college can, however, limit soliciting on certain areas of the campus, which sometimes presents problems to both courts and college administrators. Those parts of the campus in question include administrative areas, academic areas, common areas, and residence halls.

## II. ADMINISTRATIVE, ACADEMIC AND COMMON AREAS AND SOLICITATION

Wood v. Davison and other cases clearly indicate that "a college or university has the right to adopt and enforce reasonable non-discriminatory rules and regulations governing the utilization of its facilities" (at 544). This means, in effect, that the college may limit solicitation as to time, manner, and place with regard to the "primary use to which the property has been dedicated" (Snyder, at 929). Although "[t]eachers and students have the right to express their views individually or collectively with respect to matters of concern to the college or to the larger community. . ." (Pickings v. Bruce, at 89), this does not include the expression of views which might disrupt ordinary educational activities on the campus. A sound conclusion then, is that academic and administrative areas could be subject to constitutionally permissible regulations which impose only reasonable "time, place, and manner" restrictions on the right to distribute handbills or pamphlets, and to solicit in general. As Rosenfeld

points out (p. 112), a university, by applying the guidelines suggested in Wolin, could "exclude certain areas from the public forum category. Classrooms, for example, but maybe not the halls adjacent to those classrooms," and concludes that students unions, streets, walks, and park areas would problably be considered public forums, and therefore subject to First Amendment speech guarantees.

By adopting a policy that prohibits soliciting in academic buildings, administrative buildings, libraries, and other educational settings (such as laboratories), but which allows reasonable solicitation in other "common" or "public forum" areas, which are accessible to the public at large, the college would be well within the limits delineated by the courts and by the Constitution inregard to regulating freedom of speech. Whereas the issues involved in solicitation in academic, administrative, and common areas are fairly straightforward, and have been adequately resolved, the issue of soliciting in residence halls however, has not.

## III. DOOR-TO-DOOR SOLICITATION IN THE RESIDENCE HALLS

In addressing the problem of soliciting in the residence halls of a college, several separate questions surface. These include:

A. Is there a difference, legally, between door-to-door solicitation in a residence hall and door-to-door solicitation on a public street?

B. Is there a difference, legally, between door-to-door solicitation in a residence hall and solicitation in its common areas?

C. Is there a legal difference between commercial and non-commercial solicitation in a residence hall?

D. Does the college's interest in a student's right to privacy counterbalance another student's free speech rights, both to hear and to speak, in a residence hall solicitation case?

To answer these and other questions about soliciting in residnece halls, three cases will be examined in detail. To date, the U.S. Supreme Court has not decided a case involving solicitation in a residence hall; therefore, lower court decisions in James v. Nelson (a federal district court case, 1972), Brush v. Pennsylvania State University (Superior Court of Pennsylvania, 1977), and American Future Systems v. Pennsylvania State University (U.S. District Court, 1979) serve as the basis for information. The cases will be discussed in chronological order, with information from other relevant cases included. Conclusions based on the three cases will be presented at the end of each case discussion.

James v. Nelson

This case involved the dormitory solicitation policy of Northern Illinois University, which included two regulations. The first forbade solicitation of any kind on student living floors, whereas the second was developed in response to requests from students for relaxation of the first regulation after the first was interpreted to apply to political canvassing as well as to commercial solicitation.

In reaching its decision in this case, the court cited a number of findings of the U.S. Supreme Court in Healy v.James, as follows:

A. Colleges and universities are not"enclaves immune from the sweep of the first Amendment" (at 2345).

B. Although a college has a legitimate interest in preventing disruption on the campus, First Amendment protections do not apply with less force on college campuses than in the community at large (at 2348).

C. Government action which levies criminal sanctions or denies rights and privileges solely because of the individual's affiliation with an unpopular cause has been consistently invalidated by the judiciary (at 2349).

In addition, the court cited Martin v City of Struthers to establish the position that uninvited persons (i.e., solicitors) possess the authority to go from home to home and "knock on doors or ring doorbells" to communicate ideas to the occupants or to invite them to public meetings, whether the meetings be religious, political, or of other natures. The decision to admit the solicitor, reasoned the Martin Court, should be left to the occupant, not to the community.

The university countered this argument by raising the issue of the rights of dormitory residents to privacy and peace of mind. The court refuted this argument when it noted that "this case involves more, however, than the rights of those students who choose not to allow canvassing. Also to be considered are the rights of other residents to choose to hear the canvassers" (at 1068). In conclusion, the court in this case noted that "all things considered, the Court finds that the university has not met the "heavy burden" of justifying the virtual ban which it has placed upon door-to-door political canvassing in the dormitories" ( at 1063).

Brush v. Pennsylvania State Universiy Board of Trustees

The court, in this split decision case, contradicts almost all of the findings of the James court. The plaintiffs filed a class action suit seeking an injunction to restrain the enforcement of university regulations prohibiting door-to-door canvassing in a campus dormitory if a majority of the residents agreed that canvassing should be prohibited. The court, in finding for the university, held "that the university regulations prohibiting door-to-door canvassing in a campus dormitory if a majority of residents agreed that canvassing should be prohibited was a reasonable regulation designed to preserve the student's rights to privacy and does not violate the First Amendment" (at 811, emphasis added). The court employed the following reasoning to arrive at this decision ( at 811 - 816):

1. Any comparison of First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors demands a delicate balancing because "in the sphere of collision between claims of privacy and those of free press [or speech], the interests on both sides are plainly rooted in the traditions and significant concerns of our society" (Cox Broadcasting Corp. v. Cohn, at 491).

2. Efficient and orderly administration of the state university's residence halls in order to preserve a justifiable right of privacy in upper floor hallways is a significant governmental interest (Erznozink v. City of Jacksonville), and thus a university regulation prohibiting door-to-door canvassing in upper floor hallways was reasonable.

3. The lower court correctly concluded that hallways on the upper floors of a dormitory are not akin to public streets and that residents do have certain privacy interests in these common areas.

4. "We choose not to follow this decision (speaking of James v. Nelson) for the reason that the Court in that case was not made aware and did not consider the physical aspects of the dormitory structures. We believe it to be unrealistic to compare the upper floor hallway and bedroom door of a dormitory resident to be same as a public street and the front door of a private dwelling (emphasis added). We prefer to adopt the rationale that the upper floor areas of the residence halls are private living quarters" (812).

5. Martin v. City of Struthers (cited by the James court in support of its conclusion) struck down an anti-doorbell ringing ordinance primarily because it was overly broad; legislation, in this case, was available which would have permitted individual residents to prohibit door-to-door canvasing by posting their property with "no solicitation" signs and to prosecute trespassers under

criminal trespass laws. This procedure would have provided the appropriate balance between those residents who desired to hear and those who did not. In the case of dormitory residents, however, posting of individual rooms would be totally ineffective in preserving any right of privacy in the common hallways and would create, in effect, a right to "insert a foot in the door and insist on a hearing"--a right rejected by the Supreme Court in Kovacs v. Cooper (at 86).

Brush contains a number of guidelines which an administrator could frame as questions in developing a solicitation policy. These include:

1. Is soliciting permitted in the main lobbies of otherwise closed residence halls?
2. How do students enter and leave the building; is there only one main entrance, through the main lobby?
3. Can students be paged from the main lobby, or telephoned from other areas of the campus?

According to the Brush court, if the answer to these three questions is yes, the rights of those residents who wish to hear are adequately protected (at 815).

American Future Systems v. Pennsylvania Sate University

The court, in this case, employed some of the same reasoning and reached some of the same conclusions as the Brush court; this case differs significantly from Brush, however, in that the door-to-door soliciting in the residence halls was of a commercial nature. The court, in finding for the university, held that (at 1252-1253):

1. The university's interest in the privacy of its students and in preventing a company engaged in questonable commercial practices from soliciting on campus were sufficient to overcome any possible infringement upon the First Amendment rights of a plaintiff occasioned by the prohibition of its sales demonstrations.

2. The university could not be enjoined from continuing to enforce its policy against commercial solicitation on campus as it was not shown that the university's policy had any effect on the plaintiff's ability to disseminate information entitled to First Amendment protection, as any incidental infringement of the plaintiff's First Amendment rights were completely justified by the university's interest of privacy and avoidance of the danger of "in person" solicitation.

The following reasoning was employed by the court in reaching these conclusions (at 1253-1254):

A. By enforcing its policy against commercial solicitation on campus, the university engaged in a state action which was sufficient to subject it to the strictures of the Fourteenth Amendment (citing Benner v. Oswald).

B. A commercial vendor has a right, subject to reasonable time, manner and place restrictions, to disseminate consumer information to students at a university, but not to sell merchandise.

C. A university's regulations prohibiting commercial solicitation in the residence halls could not be construed as a restriction upon First Amendment free speech rights because, so long as its sales information is reasonably available to college students by other means, a commercial vendor has no First Amendment right to disseminate the information on campus in the manner in which the vendor chooses.

D. Deceptive and fraudulent commercial speech is clearly subject to reasonable regulation.

E. Commercial speech is not wholly undifferentiable from other forms of speech and can be regulated in a manner not necessarily permissible in the field of non-commercial speech where in-person solicitation is concerned. The difference between door-to-door (in-person) commercial solicitation and other types of commercial solicitation is that the former has the potential for exerting pressure on the recipient of the information, demands an immediate response from him, and countervails, to some extent, the purpose of advertising, which permits free, rational, and informed decision-making (emphasis added).

Guidelines formulated by the court suggest the following questions which an administrator should consider when developing a policy that would regulate commercial residence hall solicitation:

1. Does the policy specifically prohibit the conducting of any business enterprise for personal profit in or around university-owned residence halls?
2. Can students invite vendors to their residence halls for the purpose of conducting business on an individual basis?
3. Are telephone numbers for students generally available to vendors and can vendors contact said students by telephone?
4. Is a "no trespassing" sign posted at or near the entrance of each residence hall?
5. Are residence hall facilities reserved for the use of residents and their invited visitors and guest only?
6. Is the basis for the non-solicitation policy in the residence halls based on the assumption that the proper study atmosphere and privacy of students would be impossible to maintain if commercial vendors were permitted to conduct sales activities within the residence halls?

7. Can vendors advertise in the student newspaper or on the student radio station?

8. Can vendors freely mail commercial items to students in residence halls?

If the answers to these questions are yes, then the administrator probably has a sound policy which will stand a First Amendment test.

## IV. CONCLUSIONS

In the preceding sections, the issue of solicitation on the college campus has been examined in detail, beginning with a broad view of the campus as a whole, then narrowing the focus to the various subparts of the campus, and concluding the discussion by examining solicitation in residence halls. From the perspective afforded by this method of analysis, the following conclusions concerning soliciting on the campus can be made; conclusions which administrators should consider when developing, or reviewing, their campus solicitation policy. These conclusions are:

1. Colleges can regulate solicitation, but are limited in the extent to which they can regulate solicitation because of First Amendment free speech guarantees.
2. In deciding what areas of the campus are "public forums," and therefore covered by the First Amendment, administrators should consider:
   a) the character of the area;
   b) the usual patterns of activity that occur in the area;
   c) the essential purpose of the area;
   d) the number and classes of person who use it.
3. Solicitation which constitutes a "clear and present danger" to those who are recipients of the activity is not protected by the First Amendment.
4. Regulations which attempt to limit solicitation should be narrow in scope and as specific as possible, so that misinterpretation of their content or application is not likely.
5. False or deceptive commercial solicitation can be regulated by colleges.

6. Solicitation may be regulated on campus according to the reasonable time, manner, and place concept.

7. Academic and administrative areas, and common areas (such as hallways) adjacent to classrooms are areas in which solicitation can be prohibited.

8. Common areas such as student unions, walks, and park areas on the campus would probably be considered "public forums" where solicitation would be protected by the First Amendment.

9. A residence hall, for purposes of soliciting, is not the same as a public street. Therfore, so long as solicitors have means of conveying their information to the students living in a residence or hall, door-to-door solicitation (whether commercial or not commercial) can be regulated by the college administration.

Hopefully, this discussion of soliciting on the campuses of public colleges or universities has answered the important questions and examined the relevant issues. College administrators, faced with an increasingly litigious society, must be aware of the legal consequences of all their actions, including--and perhaps especially concerning--seemingly simple matters such as formulating solicitation policies.

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Wolin v. Port of New York Authority, 397 U.S. 664 (1970).

Wood v. Davison, 351 F. Supp. 543 (1972).

FOOTNOTES

[1]Lovell v. City of Griffin, Schneider v. State, Hague v. C.I.O., Jamison v. Texas, Marsh v. Alabama, and Talley v. California.

[2]People v. Davis and Lovell v. City of Griffin.

[3]Jones v. State Board of Education, Goldberg v. Regents, Snyder v. Board of Trustees.

[4]Tinker v. Des Moines, Healy v. James, Brandenburg v. Ohio, New Left v. Board of Regents, James v. Nelson, Jones v. Board of Regents, Norton v. Discipline Committee, Watson v. Board of Regents. Molpus v. Fortune.